IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 43

THE TEE-HIT-TON INDIANS, an identifiable group of Alaska Indians, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

REPLY BRIEF FOR PETITIONER

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This brief offers simply a page by page commentary on respondent's brief. Our comments will be grouped in the same sequence as that of the Points in our principal brief, but all page references to the Government's brief will be italicized.

By way of preview, it is fair to warn that in entirely too many instances the authorities cited but seldom quoted by respondent fall woefully short of supporting the categorical assertions to which they are appended.

Petitioner's Point I

The Government's corresponding Point I is wholly unresponsive. Devotion of almost thirty pages (*pp. 13-31*) to exclusive discussion of the stateside picture is no answer to the position summarized at page 7 of our brief (and fully developed at pages 14-28) that—

> "The gist of our argument is that there are two major considerations which necessarily lead to an end result in *Tlingit* Alaska very different from the familiar stateside concept of 'original Indian title' * * *.
>
> "One is that the historical, political, and legal background of Russian America was so fundamentally different from that of the forty-eight states of Continental United States that *Tlingit* aboriginal full proprietary ownership continued unimpaired throughout the entire period of Russian ownership."

Begging the question on such a scale can serve only to muddy the waters and to confirm that the Government dare not venture to meet this issue squarely—as is only too apparent on even a cursory analysis of the relatively few pages which even purport to reply more directly to our contentions.

Specifically, its *pages 32-33* offer merely an unsupported *ipse dixit* echo of the preceding pages and then go on to convey a distinctly wrong impression. The quotation from Senator Sumner's speech is bad enough. For the whole context of that speech shows that he was talking in terms of sovereignty and cession, and that the quoted sentence must be read in such a setting.

But it is the paragraph at the bottom of *page 33* that is open to most serious exception—especially in its specific reference to the alleged "proprietary rights specified in this decree." Little wonder that the Government studiously avoided any quotation from an edict which it boasts of as furnishing "conclusive" and "irrebuttable" support

for its position! For nowhere in either the Edict or the attached Rules is there any reference to rights of a proprietary nature, and the full text makes it plain that the Emperor was acting in the capacity of a sovereign rather than of a proprietary owner. In short it recites that smuggling was so rampant that specific regulation of a police nature had become necessary for both Alaska and Siberia, and that there are accordingly attached and promulgated some 63 Sections of extremely detailed "Rules established for the limits of navigation and order of communication along the coast of Eastern Siberia, the northwestern coast of America, and the Aleutian, Kurile, and other waters."*

The only reference to discovery or occupation is in some correspondence during the following year, when the Russian Minister to the United States replied to a protest by the American Secretary of State against the "assertion of a **territorial claim** on the part of Russia, extending to the fifty-first degree of north latitude on this continent."** In

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* The true scope of both the Edict and the Regulations is sufficiently evidenced in the opening sections of the latter—

> "Sec. 1. The pursuits of commerce, whaling, and fishing, **and of all other industry**, on all islands, ports and gulfs, including the whole of the northwest coast of America, beginning from Behring's strait to the fifty-first degree of northern latitude, also from the Aleutian islands to the eastern coast of Siberia, as well as along the Kurile islands from Behring's strait to the south cape of the island of Urup, viz: to 45° 50′ northern latitude, are exclusively granted to Russian subjects.
>
> "Sec. 2. It is therefore prohibited to all foreign vessels not only to land on the coasts and islands belonging to Russia, as stated above, but also to approach them within less than a hundred Italian miles. The transgressor's vessel is subject to confiscation, along with the whole cargo."

** The "territorial claim" indicated in Sec. 1 ranged from a point just above the northern extremity of Vancouver Island (several hundred miles south of the present site of Prince Rupert, B. C.) in a great circle around to and well down into the islands of the Japanese archipelago.

the further course of that correspondence, the Secretary of State, in a second letter, went on to specifically assert as clear and indisputable—

> "The right of the citizens of the United States to hold commerce with **the aboriginal natives of the northwest coast of America, without the territorial jurisdiction of other nations** * * *".

Among other things, the Russian Minister in his concluding letter referred to the 1799 Charter of the Russian American Company as simply—

> "conceding to the said Company a part of the sovereignty or rather certain exclusive privileges of commerce * * *".

These quotations are offered to illustrate that the supplemental diplomatic correspondence as well as the Edict and Rules was pitched wholly at the level of territorial sovereignty rather than of proprietary ownership. Also that back in 1822 the present respondent did not recognize Russia as having acquired any rights of any sort as against the Tlingit. And even if some of the "pursuits of commerce, whaling, fishing, and of all other industry" be considered as proprietary rights, the Edict purports to take none of those rights away from the Indians, but, if anything, would appear to confirm those rights in the Indians and all other Russian subjects in the area covered by the Edict, as against all outsiders or foreigners. For to whatever extent the Indians may have been subject to the sovereign power of Russia, they were Russian subjects within the intent, meaning, and protection of the Edict. See definition of the noun, "subject", Webster's New International Dictionary, Second Edition, Unabridged, 1948, page 2509.

The argument and footnotes on *pages 34-37* still further illustrate our opening criticism on page 1 of this brief, and by the same token confirm the inherent weakness of the Government's case. For it is the "definitely settled" law of this Court—

> "That by the law of nations **the inhabitants**, citizens, or subjects **of a conquered** or ceded country, **territory**, or province, **retain all the rights of property which have not been taken from them by the orders of the conqueror**, or the laws of the sovereign who acquires it by cession, **and remain under their former laws until they shall be changed.**" (*Mitchell* v. *United States*, 9 Pet. 711, 734, inadvertently cited to page 731 at page 32 of our principal brief.)

The oblique reference on *page 34* to how other nations went about seizing natives' land elsewhere avails the Government nothing, for it was Russia's express policy not to take land from the Tlingit anywhere in Alaska. The quotation about Russia taking what it wanted which is so played up in the footnote on *page 35* is a wholly gratuitous and unsupported observation in the *opinion* of the Court of Claims. (This Court has held that it is not at liberty to treat statements in an opinion of that Court as additional findings, *United States* v. *Wells*, 283 U.S. 102, 120, but even more serious is the extent to which the Court of Claims expressly attributed (R. 19) the decision here under review to that particular erroneous assumption.) Not only do that Court's own findings of fact which are discussed and quoted at page 8 of this brief, *infra*, go far toward rebutting any such assumption, but it is in direct conflict with a widely recognized and authoritative text—Bancroft's History of Alaska (1890 ed.): First, as to Sitka—

> "At the same time he [Baranoff] asked for the grant of a small piece of ground for the erection of buildings and for which he offered to pay in beads and other trading goods. The barter was concluded * * *" (Page 388)

And then as to twelve other fortified stations—

> "If natives already occupied the most convenient sites, Baranoff was permitted to form settlements at the same points, provided he obtained their consent by

purchase or by making presents". (Page 414, footn. to 9).

Nor has there been any "misconception" on our part as to the extent of possession that would have been necessary to perfect an inchoate title—even if for sake of argument it could be assumed that the doctrine of discovery obtained in Alaska and that we were interested in the matter of sovereign rights. Not a single one of the authorities cited at *pages 35-36* would support the broad impression sought to be conveyed on that point. All three authorities approach the matter primarily from the international law standpoint, as Twiss puts it, of a nation's "obligation toward other Nations * * * if it seeks to found an exclusive title to its possession upon the Right of Discovery". (page 162). The pages cited from his work are summed up (page 170) in the paragraph already quoted in full at page 26 of our principal brief. The pages cited from Hall and Lawrence are even more specific—but against rather than for the Government's statement of the alleged principle. Those from Hall are from a chapter similarly devoted to and entitled "Territorial Property of a State," which phrase is defined in the opening sentence as "the property occupied by the state community and subjected to its sovereignty." By contrast, the pages cited by the Government include (page 104) without change the identical excerpt from Hall's 5th Edition already quoted at pages 24-25 of our principal brief.

Both Hall and Lawrence agree on the difficulty of laying down any hard and fast yardstick, but both also agree in negativing the very implications for which the Government cites them.

For example, Lawrence, after reiterating at page 151 that the mere fact of settlement, like the mere fact of annexation, will not give even sovereign rights while it stands alone, sums up at page 153 to the effect that—

> "Occupation of a considerable extent of coast gives a title up to the watershed of the rivers that enter the

> sea along the occupied line; but settlement at the mouth of a river does not give a title to all the territory drained by the river."

and Hall similarly questions whether even the

> "occupation of one bank of a river necessarily confers a right to the opposite bank." (Page 108.)

Enough has been cited to demonstrate two points. One is that the Government's citations fall short of supporting its allegations. And the other is that even at best all three authorities are concerned primarily with the establishment of sovereign rights, and *a fortiori* discovery and sparse occupation would lend even less support to the development of an adverse proprietary ownership. Especially so in Alaska where none of the title to the soil was taken from the Indians and granted to others as was the common practice stateside. Cf. *Johnson* v. *McIntosh*, 8 Wheat. 543, 579-581, 587-589.

The setting up of straw men by the Government in the paragraphs beginning on *pages 37 and 38* are further *indicia* of its inability to meet our case squarely and head on. Our only reference to Russia not being a Roman Catholic or maritime power was by way of explanation and not of argument such as is now sought to be attributed to us. But we did go right on in the very next paragraph on pages 24-25 of our brief to point out on the same eminent authority now cited by the Government that by the time Russia finally reached Alaska "the bare fact of discovery" had become "an insufficient ground of proprietary right," and indeed the Government's discussion on its *page 39* tends to confirm rather than rebut our position.

As to the paragraph beginning on *page 38*, it is sufficient to note that we never advanced petitioner's relatively higher culture as having in any way *prevented* Russia's acquisition of title by discovery. But even if there were something here which called for reply the quotation from Lawrence merely establishes that such a territory would be

"open to occupation." That still gets the Government no where, for the record already shows petitioner's initial ownership of most of the Prince of Wales Island area here in question (Respondent-defendant's Exhibit 6, Chart 11) and the findings of fact show no adverse occupation or administration.

But even more interesting is the way the Government's quotation from Lawrence's page 148 leads us right on to two especially pertinent paragraphs on the same and the two immediately following pages—

> "Occupation is not effected by discovery * * * effective international occupation is made up of two inseparable elements—*annexation* and *settlement*. * * *
>
> "Annexation alone is incapable of giving a good title. It is necessary for effective occupation that some hold be taken on the country and maintained. This is done by settlement; that is to say **the actual establishment of a civilized administration** and civilized inhabitants upon the territory and their continuous presence therein." (Italics as in the original.)

Indeed those paragraphs are so pertinent when applied to the findings of fact which are part of the record before this Court as to warrant the reprinting of paragraphs 11-15 of those findings (R. 28-29) at this point—

> "11. **The Russian American Company**, originally chartered in 1799 and rechartered in 1821 and 1844, was in form a commercial fur and trading monopoly, but in practice it also **functioned as the only governmental agency ever set up in Alaska by the Russians.**
>
> "12. **The Aleutian Islands and the Alaska Peninsula were the only areas ever brought fully under Russian administration**, and the natives of those areas were required to work for the Russian American Company. The other Indian tribes, **and the Tlingit** in particular, **were generally considered as independent.** During the Company's first twenty years there was considerable hostility between Tlingit and Russians.

"13. In the Charter of 1821, **the distinction was drawn between 'tribes inhabiting the places administered by the Company' and 'the independent neighboring people.'** Secs. 45-56 dealt at length with the former. Secs. 57-59, 68, dealing with the latter, provided in part as follows:

"Sec. 57. The principal object of the Company being catching of the sea animals and wild beasts, **the Company has no need to spread its rule** from the coast where it practices such catchings, into the interior of the country, **and it should not make effort to conquer tribes inhabiting these coasts**; therefore, if the Company should think it in its interest to establish posts in some localites of the American continent in order to secure its commerce, it shall do so with consent of the aboriginal inhabitants of such localities and shall use all possible means in order to maintain a good relationship with them, avoiding anything which might create in these people suspicion of the intention to violate their independence.

"Sec. 58. The Company is prohibited to ask from such tribes, tributes, taxes, dues or any other kind of contributions; * * *

"14. In the Charter of 1844, **substantially similar distinction were drawn** and Secs. 281-285 provided as follows:

"Sec. 281. The colonial government shall not forcibly extend the possessions of the Company in regions inhabited by tribes not dependent on the colonial authorities.

"Sec. 282. If the colonial government deem it useful to open, for the safety of its trade operations, factories, redoubts, or so called single posts in some places of the American continent, it shall proceed by the consent of the natives of these places, and apply all possible means to obtain their favor, trying to avoid anything which might arouse their suspicion of any intention to violate their independence.

"Sec. 283. The company shall be prohibited from

demanding from these people tributes, taxes, or donations of any kind whatever * * *

* * * * * * * * *

"Sec. 285. The relations of the colonial administration with the independent tribes shall be limited to the exchange, by mutual consent, of European wares for furs and native products.

"15. Tradition has it that Russian traders visited the Stikine winter village at Wrangell more or less regularly over a period of years prior to 1867; that on their first advent they asked for and received permission to go ashore and build a storehouse; and that on their final visit they gave the key to an Indian saying that it indicated that the property now was returned to the Indians."

The record thus makes crystal clear that there was never any generally "effective occupation" of the Tlingit area by the Russians or acquisition of any general rights of property from the Tlingit.

Petitioner' Point II

The Government's Point IV (*page 72*) is its only other point which would appear to be an attempt to directly meet one of our points, viz: our Point II. But again the seeming promise of its heading is unfulfilled. At pages 31-32 of our principal brief we not only cited but also quoted at length from four decisions of this Court which are directly in point and controlling.

The Government's typical avoidance of any serious discussion of these cases is most significant. Nor can it give them the brush off by its suggestion that the language of the treaties involved was distinguishable (*page 75*). Those cases go far deeper than mere language. They go right down to bedrock—to the fundamentals of a treaty of cession. Not one of the four rested on the particular language of the treaty involved. And in only one instance was the language referred to even as corroboration of the universal principle already independently announced. In the *Percheman* case, 7 Pet. 82, 87-88, we find the following—

> "The cession of a territory by name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them would be necessarily understood to pass the sovereignty only, and not to interfere with private property. If this could be doubted, the doubt would be removed by the particular enumeration which follows: 'The adjacent islands dependent on said provinces, all public lots and squares, vacant lands, public edifices, fortifications, barracks, and other public buildings which are not private property, archives and documents which relate directly to the property and sovereignty of the said provinces, are included in this article.' "

The tremendous impact which at *pp. 75 ff.* the Government seeks to impute to the probably fortuitous addition in a later treaty of the single word "individual" gets pretty well lost in the shuffle when we read what this Court went on to say about such an entire provision in the paragraph immediately following the above quotation—

> "This special enumeration could not have been made, had the first clause of the article been supposed to pass not only the objects thus enumerated, but private property also. The grant of buildings could not have been limited by the words 'which are not private property' had private property been included in the cession of the territory."

In contrast with publicly owned property clan property was certainly private property whether it was individual property or not. And in any event the present case involves timber lands and not buildings or edifices of any sort.

The *Miller* decision of the Ninth Circuit is open to substantially the same criticism, but even more indefensible is the temerity of the Government in repeatedly citing that case to this Court as it does over and over again at *pages 11, 42, 72, 73 and 76.* For it is only two years since this same United States which is respondent in the instant case devoted two long subpoints in its brief in *United States* v.

Libby, McNeil & Libby, 107 F. Supp. 697 (1952), to the thesis that the *Miller* case is incorrect, and still another point to the most vigorous support of the contrary position which had consistently been held by the Department which has the primary responsibility for administration of both Indian affairs and Government lands. See our principal brief, pp. 36-41.

And whatever may be the persuasive value of the administrative decisions of that Department as recounted on those pages, it would seem that under the circumstances just described the present references on *page 78* of the Government's brief to "vacillations" and lack of "unanimity" come with dubious grace from the Department of Justice. For any vacillation is wholly of that Department's own making and apparently for admitted reasons of expediency in winning cases as much or even more than because of any interest in establishment of correct principles of law.*

Before leaving *page 78* let us correct two definitely false impressions which its text might readily succeed in conveying. The first correction is that the *Grimes Packing Company* case was wholly one of statutory construction and application to current conditions, and did not present any issue as to pre-existing Indian title. (For that matter even if the latter issue had been involved, the controlling considerations could have been very different as that case related to a non-Tlingit area tributary to the Alaska Peninsula where Russian administration had been established.

*If this Court has any interest in delving further into this departmental background it will find that the present much vaunted agreement between the Departments seems to be based on a January 11, 1954, letter of the Assistant Secretary of the Interior (printed in the Committee Print No. 12 cited at page 10 of the Memorandum for the United States on the Petition for Certiorari) which in turn was obviously forced by a letter of October 22, 1953, from the Attorney General to the Secretary of the Interior (printed at pages 14-18 of that Memorandum). Also that the reference to the *Miller* case at pages 15-16 of the Memorandum stresses the reliance which has been placed upon it in the defense of other cases rather than its inherent correctness.

See pages 8-10 of this brief, *supra*.) The other is that the *Libby, McNeil & Libby* decision was predicated, not on any holding of law that the Indians could not have had rights such as claimed, but rather on insufficiency of evidence in the particular case, as well as on failure to comply with technical requirements of the Administrative Procedure Act.

Petitioner's Point III

Like the opinion below, respondent's brief in the same ostrich-like way simply avoids any serious consideration of that Point despite the fact that Congress saw fit to recognize its serious possibilities as recently as in the Act of August 8, 1947 (Pet. Br., page 2). Indeed the only and very casual reference to it (*footnote 24 at page 72*), buried as it is in connection with discussion of an entirely different aspect of the case, is no answer whatever. For alleged non-recognition of rights which are claimed to have already existed obviously can furnish no answer to petitioner's claim of the creation of a *new* right in 1884 or 1900. Furthermore, it is familiar law that effect shall be given to every clause and part of a statute. *Ginsberg* v. *Popkin*, 285 U.S. 204, 208.

There is only one possible inference. Respondent has no answer to this Point.

Petitioner's Points IV and V

Frankly we cannot conceal our own feeling that respondent's effort to avoid meeting either of these two issues (*pages 79-80*) is open to much the same inference. But be that as it may, the reasoning advanced on those pages in support of the suggestion for putting off decision is puerile —and we are quite sure that respondent knows it to be so. For such a question as whether the evidence summarized in issue 5 (as recited in the formal court order at R. 7) constitutes *prima facie* evidence of the effect there noted presents a completely stated issue of law not dependent upon further evidence or proceedings of any sort. That order

recognized this issue for what it really is—an integral and major factor in the big overall question as to the nature and extent of Indian land titles in southeastern Alaska. That question was the outstanding reason for review advanced in our Petition for Certiorari (pages 5-6), and presumably a major consideration in its having been granted. From the very nature of things such less intensive user since the turn of the century is not confined to the Tee-hitton area alone, and the early decision of this issue is just as essential in the general interest as that of the first four issues.

Even at best there lies before us a long and tedious row to hoe before a final decision of this case can be reached. Our Points IV and V were fully presented below and in our Petition for Certiorari, their decision is essential within both the letter and the spirit of the order under which this case was tried in the Court of Claims, and we urge that they should be considered by this Court. *Ecker* v. *Western Pacific Railroad Corp.*, 318 U.S. 448, 489; *Girard Trust Company* v. *United States*, 270 U.S. 163, 168-169. Especially so as the allowance of review was not subject to any such limitation.

Petitioner's Point VI

The Government's Points II and III at *pages 40-72* advance a line of argument which was not even suggested in its brief below and which has acquired transitory importance only because of having been injected into the case by the Court of Claims on its own initiative as a principal ground of its decision (R. 32). These issues will never be reached if either of our Points I or III is sustained.* But

* The alleged distinction between recognized and unrecognized title was not raised either in respondent's answer below (R. 3-6) or in the order limiting the issues to be tried in the present proceeding (R. 7-8). If, however, it becomes important factually, it should be remembered that there were a number of treaties between the Russians and various Tlingit groups, one or more of which might be very relevant.

if perchance these issues should be reached, we find nothing in the Government's brief which calls for answer further than what will already be found in our Point VI at pages 52-62 of our principal brief. See also the *amicus curiae* briefs of the States of Utah and New Mexico.

Conclusion

Unless this Court is prepared to discard a long line of its own precedents and develop from scratch some new justification for affirming the judgment below, it is submitted that that judgment should be reversed because the case made in our principal brief is controlling and neither the opinion below nor the Government's brief advance any convincing reason for holding otherwise.

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